

No. 12,098

In the United States Court of Appeals
for the Ninth Circuit

FELICE DI PROSPERO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The Tax Court rendered no opinion.

JURISDICTION

The petition for review (R. 8-9) involves federal income taxes for the years 1942, 1943, 1944 and 1945. On January 9, 1948, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$1,945.61. (R. 6-7, 12-13.) On April 9, 1948, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency. (R. 3-7.) Pursuant to motion, the Tax Court on July 8, 1948, entered an order dismissing for lack of jurisdiction. (R. 2, 10-11.) The case is brought to this Court by a petition for review filed September 30, 1948 (R. 8-10), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Did the Tax Court properly dismiss for lack of jurisdiction where the petition for redetermination was not filed with it within ninety days after the mailing of the deficiency notice, as provided in Section 272(a) of the Internal Revenue Code, but where an attempt was made to deliver the petition after the closing hour of the Tax Court on the ninetieth day?

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 272 [As amended by Section 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669, and Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. PROCEDURE IN GENERAL.

(a) (1) *Petition to Tax Court*.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. * * *

* * * * *

(c) *Failure to File Petition*.—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

SEC. 1111 [As amended by Section 504 of the Revenue Act of 1942, *supra*]. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rule of evidence applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District.

(26 U.S.C. 1946 ed., Sec. 1111.)

Rules of Practice before the Tax Court of the United States (revised to November 3, 1947) :

RULE 1.—BUSINESS HOURS

The office of the clerk of the Court at Washington, D. C., shall be open during business hours on all days, except Saturdays, Sundays, and legal holidays, for the purpose of receiving petitions, pleadings, motions, and the like. "Business hours" are from 8:45 o'clock a.m. to 5:15 o'clock p.m.

RULE 9.—FILING

Any document to be filed with the Court, must be filed in the office of the clerk of the Court in Washington, D. C., during business hours (see Rule 1) ;
* * *

STATEMENT

The notice of deficiency was mailed to the taxpayer on January 9, 1948. (R. 3, 6-7, 12-13.) The ninetieth day after the notice was mailed, and the last day on which the petition could be filed, was April 8, 1948. The petition was received and filed by the Tax Court on April 9, 1948. (R. 1.) On April 6, 1948, taxpayer's counsel mailed from San Francisco, by special delivery, air mail, registered article No. 756231, addressed to the Tax Court of the United States, Clerk's Office, Washington, D. C. (R. 11.) A letter from the Post Office Department (R. 11) stated that, insofar as could

be ascertained, the article was received in the United States Post Office, Washington 13, D. C., at approximately 2:45 p.m., April 8, 1948, and left the Post Office by special delivery messenger at 4:45 p.m. that day for delivery to addressee. When the messenger arrived at the address of the Tax Court with the article he found the office closed. The register was delivered the next morning, April 9, 1948. (R. 11-12.)

The Commissioner filed a motion to dismiss for lack of jurisdiction (R. 1, 8, 10) on the ground that the petition for redetermination was not filed within the ninety-day statutory period (R. 8, 10), and on July 8, 1948, the Tax Court entered an order dismissing the proceeding for lack of jurisdiction (R. 7-8, 10-11). From that order, the taxpayer petitioned this Court for review. (R. 8-10)

SUMMARY OF ARGUMENT

The statute conferring jurisdiction provides that a petition for redetermination shall be filed with the Tax Court within ninety days after the Commissioner has mailed the deficiency notice. The Tax Court rules provide that documents shall be filed during business hours, and that business hours are from 8:45 a.m. to 5:15 p.m. These rules, having been promulgated under the authority of Section 1111 of the Internal Revenue Code, have the force of law. The attempt to deliver the petition to the Tax Court after 5:15 p.m. on the last day did not constitute a filing, and the petition therefore was not filed within the ninety-day statutory period. The appeal period, being mandatory and jurisdictional, cannot be altered, enlarged or extended, and the Tax Court properly dismissed the proceeding.

ARGUMENT

The Tax Court Properly Dismissed for Lack of Jurisdiction

Section 272(a) of the Internal Revenue Code, *supra*, requires that petitions for redetermination must be filed

within ninety days after the mailing of the deficiency notice. The rules of the Tax Court provide that documents must be filed with the court during business hours, which are from 8:45 a.m. to 5:15 p.m. These rules, having been promulgated under Section 1111 of the Internal Revenue Code, *supra*, have the force of law. *Edward Barron Estate Co. v. Commissioner*, 93 F. 2d 751 (C.A. 9th); *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 974 (C.A. D.C.), certiorari denied, 277 U. S. 592; *Goldsmith v. Board of Tax Appeals*, 4 F. 2d 422 (C.A. D.C.).

To constitute a filing under the statute and rules, therefore taxpayer's petition must have been delivered to the proper official of the Tax Court prior to 5:15 p.m. on the ninetieth day. *Edward Barron Estate Co. v. Commissioner, supra*; *Lewis-Hall Iron Works v. Blair, supra*; *Poynor v. Commissioner*, 81 F. 2d 521 (C.A. 5th).¹ In the instant case this was not done; the petition was actually filed in the Tax Court on April 9, 1948 (R. 1), the ninety-first day after the mailing of the deficiency notice. To be sure, a registered article, which it is assumed contained the petition although the record does not show that it did, was brought to the Tax Court after closing hours on the ninetieth day. Upon finding the court closed, the special delivery messenger returned the article to the post office, and the article was delivered and signed for the next morning—the ninety-first day after the mailing of the deficiency notice.

¹ The generally accepted definition of "file", both as used in the statutes and in ordinary usage, conforms to the interpretation given by the above-stated authorities; that is, the delivery of the papers in question to the proper officer, and by him received to be kept on file. *United States v. Hardy*, 74 F. 2d 841 (C.A. 4th); *In re Gubelman*, 10 F. 2d 926, 929 (C.A. 2d), reversed in part on other grounds *sub nom. Latzko v. Equitable Trust Co.*, 275 U.S. 254; *Laser Grain Co. v. United States*, 250 Fed. 826, 831 (C.A. 8th); *Emmons v. Marbelite Plaster Co.*, 193 Fed. 181, 183 (C.C. Nev.); *Stone v. Crow*, 2 S.D. 525; *Gallagher v. Linwood*, 30 N.M. 211; *Hoyt v. Stark*, 134 Cal. 178; *Wescott v. Eccles*, 3 Utah 258; *Conant's Estate*, 43 Ore. 530, 534.

These facts do not show a filing on the ninetieth day, as a filing was defined in the foregoing cases. Indeed, in *Stebbins' Estate v. Helvering*, 121 F. 2d 892 (C.A. D.C.), the court stated that a petition, in order to be filed, must be delivered to a proper officer of the Board to be filed before the close of business of the final day permitted in the statute. Again, in *Lewis-Hall Iron Works v. Blair*, *supra*, the Court of Appeals sustained the Tax Court's dismissal where the petition for redetermination had been left at the Tax Court by a post office messenger after the closing hour of the court on the last day for the filing of the petition.

In the light of the rules of the court and the existing authorities, it is manifest that the petition was not filed within the ninety-day statutory period, and that the Tax Court therefore had no jurisdiction. It has been consistently held that the time limitation for filing of the petition is statutory and jurisdictional. A strict compliance with the terms of the statute is therefore essential, and no equitable considerations may operate to alter those terms. *Edward Barron Estate Co. v. Commissioner*, *supra*; *Poynor v. Commissioner*, *supra*; *Chambers v. Lucas*, 41 F. 2d 299 (C.A. D.C.); *Lewis-Hall Iron Works v. Blair*, *supra*; *Stebbins' Estate v. Helvering*, *supra*.

None of the cases cited by taxpayer involves Section 272(a) of the Internal Revenue Code, nor do the cases relied upon support his position. In *Zimmermann v. Cowan*, 107 Ill. 631, the law required the clerk's office to remain open for business until 6:00 p.m. Appellant delivered a petition after six o'clock on the last day allowed, and the petition was held to have been timely filed. The court stated that the requirement that the office of the clerk be kept open until six o'clock was not understood to hinder the clerks from transacting business after that time if they wished. But, unlike the in-

stant case, there the petition was actually delivered and accepted by the clerk, not merely presented to a closed office, and there no rule required that petitions be filed during business hours. In *Helphenstine v. Vincennes National Bank*, 65 Ind. 583, the question involved was the applicability of the ancient law providing that in leap years the twenty-eighth and twenty-ninth days of February should be considered as one day. In passing, the court was required to give the definition of a "day", and stated that it meant a period of time consisting of twenty-four hours. In view of the Tax Court's Rules, that concept, however, has no application in the interpretation of Section 272(a) of the Internal Revenue Code, as the previously cited cases conclusively show. In *People v. Hatch*, 33 Ill. 9, the court was called upon to pass upon what constituted a "day" of the session of the legislature. It held that an adjournment at 10:00 a.m. did not constitute such a day. That ruling manifestly is not relevant to the problem under the statute here. In *the matter of Welman*, 20 Vt. 653, relied upon by taxpayer, is so obviously inapplicable as to require no discussion.

CONCLUSION

The Tax Court's order of dismissal was proper and should be affirmed.

Respectfully submitted,

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